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No. 90-7210

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CARLOS EDUARDO FERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's drug conspiracy convictions must be vacated on double jeopardy grounds because he was also convicted of engaging in a continuing criminal enterprise.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A44-A48) is reported at 916 F.2d 125.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1990. On January 14, 1991, Justice Souter extended the time for filing a petition for a writ of certiorari to February 15, 1990. The petition for a writ of certiorari was filed on February 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of conspiring to distribute and possess cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 1); one count of conspiring to import cocaine, in violation of 21 U.S.C. 952(a) (Count 2); one count of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 (Count 3); and five counts of using a telephone to facilitate a drug offense, in violation of 21 U.S.C. 843(b) (Counts 10, 11, 12, 19, and 27). He was sentenced to 40 years' imprisonment on the CCE count; 20 years' imprisonment on the distribution conspiracy count, to run concurrently with the sentence on the CCE count; 20 years' imprisonment on the importation conspiracy count, to run consecutively to the sentence on the distribution conspiracy count and concurrently with the sentence on the CCE count; and four years' imprisonment on each of the telephone counts, to run consecutively to each other but concurrently with the other sentences. In addition, he was fined $100,000 on the CCE count and on each of the conspiracy counts. Thus, he originally "received a term of imprisonment of 40 years and a $300,000 fine." Pet. App. A44. The district court also imposed a $50 assessment under 18 U.S.C. 3013 "on each of the eight counts, for a special assessment total of $400.00." Id. at B1.

The court of appeals affirmed. United States v. Fernandez, 822 F.2d 382 (3d Cir.), cert. denied, 484 U.S. 963 (1987) (reprinted at Pet. App. A38-A43). However, it indicated that

"there may be problems with the formal terms of the sentence," and it invited petitioner to present the matter to the district court by way of a motion under Fed. R. Crim. P. 35. 822 F.2d at 383 n.2 (Pet. App. A39 n.2).

Petitioner then filed a Rule 35 motion asking the district court to strike the convictions and sentences imposed on the two drug conspiracy counts. The district court denied the motion. However, it amended the sentence by imposing a "general sentence" of 40 years' imprisonment and a single $100,000 fine on counts 1, 2, and 3. Pet. App. B2. It also reimposed the sentences previously imposed on the telephone counts, so that those sentences would run concurrently with the general sentence. The court did not impose an assessment pursuant to Section 3013. The court of appeals affirmed. Pet. App. A44-A47.

2. On his second appeal, petitioner contended that the district court had erred by declining to vacate the convictions on the drug conspiracy counts. In petitioner's view, the existence of those convictions constitutes cumulative punishment in violation of the Double Jeopardy Clause, even though he did not receive consecutive sentences. The court of appeals noted that, despite his claim that he was being subjected to cumulative punishment in violation of the Constitution, petitioner had suggested that, as a practical matter, "the convictions on counts 1 and 2 now are meaningless." Pet. App. A46. After wondering why, if that were so, petitioner was "wasting his time" seeking to have the drug conspiracy convictions vacated, the court noted that the drug

conspiracy convictions might become significant if the CCE count were ever overturned on collateral review. Id. at A46-A47.

In support of his contention that the drug conspiracy counts had to be vacated, petitioner relied primarily on Ball v. United States, 470 U.S. 856 (1985), in which this Court held that separate convictions for receiving and possessing the same firearm could not stand. The court of appeals did not believe that Ball controlled: "Unlike the situation in Ball in which discrete statutes were not directed to separate evils, the narcotics conspiracy statutes of which Fernandez was convicted and the continuing criminal enterprise statute have different purposes. While the conspiracy statutes punish illegal agreements to import and to distribute and possess cocaine with intent to distribute, the continuing criminal enterprise statute provides for punishment of persons 'trafficking in prohibited drugs on a continuing, widespread, substantial and supervisory basis.'" Pet. App. A46, quoting United States v. Fernandez, 822 F.2d at 384 (Pet. App. A41). The court recognized that petitioner could not receive consecutive sentences on the drug conspiracy and CCE counts and that petitioner might suffer adverse collateral consequences as a result of the conspiracy convictions. But it held that "the double jeopardy clause is not violated if [adverse collateral] consequences follow from a conviction for a predicate or lesser offense which, though combined with a greater offense for sentencing, is permitted to stand." Pet. App. A47.

The court acknowledged that the Ninth Circuit had held in United States v. Hernandez-Escarsega, 886 F.2d 1560, 1582, cert.

denied, 110 S. Ct. 3237 (1990), that "'[i]t is clear from Jeffers [v. United States, 432 U.S. 137 (1977),] that Congress did not intend to allow cumulative punishment for violations of section 846 conspiracies and the greater offense of a section 848 CCE violation,'" Pet. App. A47, and therefore had vacated the defendant's drug conspiracy conviction. However, the court below did "not understand why" the conclusion that a court may not impose consecutive punishments for a drug conspiracy offense and a CCE offense makes it necessary to vacate a drug conspiracy conviction when a defendant is also convicted under Section 848. Id. at A47-A48.

ARGUMENT

As the court of appeals recognized, Congress did not intend to permit cumulative punishment for participating in a drug conspiracy and engaging in a continuing criminal enterprise, at least where the evidence supporting the "in concert" element of the CCE offense is essentially indistinguishable from the evidence supporting the drug conspiracy charge. This Court stated in Garrett v. United States, 471 U.S. 773, 794 (1985), that "[t]he focus of the analysis in Jeffers was the permissibility of cumulative punishments for conspiracy under § 846 and for CCE under § 848, and the plurality reasonably concluded that the dangers posed by a conspiracy and a CCE were similar and thus there would be little purpose in cumulating the penalties" in such circumstances. See Jeffers v. United States, 432 U.S. at 155 ("the first issue to be considered is whether Congress intended to allow

cumulative punishment for violations of §§ 846 and 848. We conclude that it did not") (plurality opinion).

The court of appeals also correctly recognized that it does not follow that a conviction on a drug conspiracy count must be vacated when a defendant is also convicted on a CCE count, even though a number of courts of appeals have held that a drug conspiracy conviction should be vacated in such a case. United States v. Rivera, 900 F.2d 1462, 1478 (10th Cir. 1990); United States v. Butler, 885 F.2d 195, 201-202 (4th Cir. 1989); United States v. Maull, 806 F.2d 1340, 1346-1347 (8th Cir. 1986), cert. denied, 480 U.S. 907 (1987); United States v. Cruz, 805 F.2d 1464, 1479 (11th Cir. 1986), cert. denied, 481 U.S. 1006 (1987); United States v. Schuster, 769 F.2d 337, 344-346 (6th Cir. 1985), cert. denied, 475 U.S. 1021 (1986); United States v. Dickey, 736 F.2d 571, 596-597 (10th Cir. 1984), cert. denied, 469 U.S. 1188 (1985); United States v. Jefferson, 714 F.2d 689, 703 & n.28 (7th Cir. 1983); United States v. Smith, 703 F.2d 627, 628 (D.C. Cir. 1983); United States v. Webster, 639 F.2d 174, 182 (4th Cir.), cert. denied, 454 U.S. 857 (1981).

This Court provided no such relief in Jeffers v. United States, see 432 U.S. at 157-158, and this Court's decision in Ball v. United States should not be construed to require such a result. The question in Ball v. United States was whether a previously convicted felon could be convicted for receiving a firearm, in violation of 18 U.S.C. 922(h)(1), and possessing the same weapon, in violation of 18 U.S.C. App. 1202(a)(1) (1982). The Court held

that "Congress did not intend [the defendant's] conduct to be punishable under both §§ 922(h) and 1202(a)," even though he had not been sentenced consecutively. 470 U.S. at 864. The Court explained that "[t]he separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored." Id. at 865.

The holding in Ball v. United States need not be extended from the simple factual context of receipt and possession of a gun to the very different context of a complex CCE case. Proof of receipt of a gun will always show possession of the gun, and possession will always show receipt except in the unusual circumstance where the defendant manufactured the gun. 470 U.S. at 862 & n.9. In the context of two such "overlapping provisions," id. at 859, it is reasonable to conclude that Congress did not intend to authorize double convictions. But as the Seventh Circuit stated in reaching the same conclusion as the court below, "[i]t is not illogical to convict a person of both agreeing to do something (§ 846) and succeeding on a grand scale (§ 848)." United States v. Bond, 847 F.2d 1233, 1238 (1988).

This Court's holding in Ball v. United States was based on the concern that the presence of an additional conviction on a defendant's record might be significant, even in the absence of a consecutive sentence, because "the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense[,] * * * may be used to impeach the defendant's

credibility and certainly carries the societal stigma accompanying any criminal conviction." 470 U.S. at 865. This case is clearly distinguishable from United States v. Ball in terms of its effects. Petitioner has been convicted under the "drug kingpin" provision, as the CCE statute is popularly known. He therefore is ineligible for parole, since Section 848 makes parole unavailable. It is hard to believe that a conviction on any lesser included offense could increase the stigma he bears in light of his CCE conviction or further undermine his credibility. And there is no reasonable likelihood that petitioner's conspiracy convictions could result in an increased sentence under a recidivist statute, since petitioner will be in prison until around 2025 and he has been validly convicted on six other counts.

Nor does the special assessment statute, 18 U.S.C. 3013, require a different result. That statute imposes a $50 special assessment for each felony count on which a defendant is convicted. But the district court did not order a special assessment in this case, so petitioner has suffered no injury on that account. More generally, we believe that in light of Jeffers v. United States, supra, it would be error for a court to impose more than a single special assessment for conviction on a CCE count and coterminous conspiracy counts, so the special assessment statute, if properly applied, should never result in increased penalties for multiple convictions in this setting.

Petitioner's reasons for seeking to have his drug conspiracy convictions vacated demonstrate why he is not entitled to that

relief. As the court of appeals recognized, petitioner presumably desires to have the convictions vacated in the hope that he may obtain release from prison if in the future his CCE conviction is undermined "on grounds that might not now even be contemplated," Pet. App. A47, but that do not affect the validity of the drug conspiracy convictions. Yet petitioner would not be entitled to release in that event. In United States v. Bond, the Seventh Circuit stated that "in the event a collateral attack affects the validity of the CCE conviction * * * the sentence under § 846 lawfully could become the basis of punishment." 847 F.2d at 1238. "That would happen automatically if the § 846 sentences remain in force, served concurrently with the CCE sentence," the court added, but "would require extra motion if the § 846 sentences had to be vacated now and resurrected at some future time." Id. at 1238-1239.

Based on the same assumption -- that the conspiracy convictions should be preserved for use in the event the CCE conviction is at some point set aside -- the Second Circuit held in a case like this one that "convictions on the lesser offenses should be combined with the conviction on the greater offense." United States v. Osorio Estrada, 751 F.2d 128, 135 (1984), modified on reh'g on other grounds, 757 F.2d 27 (1985); see also United States v. Aiello, 771 F.2d 621, 632-635 (2d Cir. 1985). "Under this method, the convictions on the lesser counts become combined with that of the compound offense and would not be merged out of existence. This leaves the part of the conviction on the lesser

offense unaffected should the compound offense be invalidated as a matter of law. The convictions on the lesser offenses would not exist as separate convictions so long as the § 848 conviction remained in place." 751 F.2d at 135. A concurring judge, who "did not know what this means ontologically," thought that it would be "appropriate to vacate the convictions on the two [conspiracy] offenses, on the condition that the convictions on those offenses would be reinstated in the event that the conviction on the [CCE] offense * * * were ever overturned for reasons not affecting the validity of the convictions" on the conspiracy offenses. Ibid. (Kearse, J., concurring). We are aware of no court of appeals that has ruled or suggested to the contrary. Thus, even in those courts where conspiracy convictions are vacated in the presence of coterminous CCE convictions, the courts would apparently reinstate the conspiracy convictions in the event that the CCE conviction is invalidated.

There is, in sum, no disagreement among the courts with the proposition that the conspiracy counts should be available to serve as the basis for punishment in the event that a defendant's CCE conviction is overturned on collateral review. The only dispute relates to the proper method for ensuring that such a defendant does not go free if his CCE conviction is reversed. That dispute, however, amounts to nothing more than an issue of bookkeeping, which has no real effect on the parties. While the courts of appeals have settled on different methods to resove that bookkeeping issue, the issue is not one of any substantial

significance to the parties or to the administration of justice. For that reason, the question presented in this case does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT ALL PARTIES REQUIRED TO BE SERVED HAVE BEEN SERVED COPIES OF THE BRIEF FOR THE UNITED STATES IN OPPOSITION BY MAIL ON APRIL 24, 1991.

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/Kenneth W. Starr
KENNETH W. STARR
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April 24, 1991